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In The

Supreme Court of the United States

October Term, 1994

THE STATE OF OKLAHOMA, et al.,

Petitioners,

v.

PONCA TRIBE OF OKLAHOMA,

Respondent.

On Petition For Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, IDAHO, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, PENNSYLVANIA, RHODE ISLAND, TEXAS, VERMONT AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

i. Does Congress have the power to abrogate the States' Eleventh Amendment immunity when legislating under its plenary powers in the Indian Commerce Clause, subjecting States to suits by Indian tribes to compel the States to perform acts to benefit the tribes?

ii. Has Congress impermissibly compelled the States in the Indian Gaming Regulatory Act to exercise their discretion and perform solely federal regulatory functions in violation of the Tenth Amendment?

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INTEREST OF AMICI STATES

This case goes to the heart of our federal system of government – the relationship of States of the Union and the Federal Government. At issue is the ability of the federal Congress directly to mandate that the States exercise their legislative discretion in a certain way and compel them to perform solely federal regulatory functions.

Congress has done so by displacing and dismissing the States' sovereign interests – firstly, by commanding the States to negotiate with Indian tribes to regulate gambling activities, and secondly, by subjecting States to suit in federal court without their consent in order to compel these negotiations. Only this Court is poised to protect vital interests of state sovereignty.

This Court is presented here and in related cases for the first time with the question whether Congress has the power to abrogate the states' Eleventh Amendment immunity under the *Indian* Commerce Clause, article I, section 8, clause 3 of the United States Constitution. While the power to abrogate has been found in Section 5 of the Fourteenth Amendment and in the *Interstate* Commerce Clause, this Court has not uncovered to date any other provision that permits the Congress to annul the judicial sovereign immunity of the states found in the Eleventh Amendment.

Moreover, the sovereign interests of the majority of the States – those with Indian lands as defined by Congress – are seriously jeopardized by the method chosen by the Congress to implement this legislation. The congressional mandate here subjects the States to the raw dictates of the federal government, enforced by the federal courts, and treats the States as mere subdivisions of a national government in violation of the Tenth Amendment. No choice, incentive or acceptable alternative is given a State under this legislation. States must comply or face federal court orders. The interest of amici States is thus obvious and paramount.

Amici States share an immediate and profound concern with the difficult and irregular implementation of an over-reaching Act of Congress and the corresponding proliferation of conflicting federal appellate and district court decisions interpreting that Act. Only this Court can resolve these conflicts. These cases arise under the provisions of the Indian Gaming Regulatory Act, Pub.L. No.

100-497, 102 Stat. 2467 (codified at 18 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721) (hereinafter IGRA). Each amicus state has lands (or may have lands taken in the future by the federal government) that fall within the definition of "Indian lands" under 25 U.S.C. § 2703(4). Each of these states allows or may allow in the future some form of gaming to be operated within its respective borders. The forms of gaming that are permitted, prohibited or regulated differ from state to state, as these are matters solely of state law. Most amici states have been or may become involved in negotiations for tribal-state compacts for gaming to be operated on such lands, as required by IGRA.[1] These negotiations have resulted in highly divergent results from state to state – including, in some states, compacts for Indian gaming operations which are prohibited to the citizens of the state at large. More commonly, the result is lawsuits filed against states in federal court by Indian tribes demanding the states compact for casino gambling even where it is criminally prohibited. While it is in the latter category that this particular suit arises – in the State of Oklahoma – other states similarly situated fear the same federal court compulsion to permit that which they criminally prohibit. This Court already has before it the petitions and cross-petitions of the States of Alabama, Florida, Kansas and Washington, in independent cases, but all arising from demands by Indian tribes to negotiate for forms of gambling criminally prohibited in those states. Under this Act of Congress, all the States are witnessing a grave degradation of their jurisdiction and possess a vital interest in having this Court protect their state sovereignty.

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[1] Amici states Maine and Massachusetts contend they are not subject to IGRA, based on their respective Indian land claims settlement acts.

Each of the amici States now faces the prospect in certain federal circuits that they may be subjected to suit in federal court without their consent and against their will by Indian tribes in violation of the Eleventh Amendment to the United States Constitution, compelling them to perform acts which the Congress can not lawfully require under the Tenth Amendment.

SUMMARY OF ARGUMENT

The Tenth Circuit's holding that Congress has the power to abrogate the state's Eleventh Amendment immunity when legislating pursuant to the Indian Commerce Clause is at odds with the holding of the Eleventh Circuit in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (1994), that Congress has no such power. *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1430 (10th Cir. 1994). Certiorari should be granted to resolve conflicts between the Eighth, Ninth, Tenth and Eleventh Circuits, as the varying and disparate interpretation and application of the Indian Gaming Regulatory Act of 1988 ("IGRA") by the federal courts has left states with no guidance with respect to the Act. Resolution of these questions is of profound consequence to the states concerned.

The federal circuits have differed sharply on their reading of and the arguable application of *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), to cases involving federal legislation under the Indian Commerce Clause. In that case, this Court held that Congress may abrogate state sovereign immunity based on its power under the Interstate Commerce Clause; the Tenth Circuit, however, read the two commerce clauses as having equal value, and thus, applied *Union Gas* to Indian Commerce Clause legislation. The States have a vital interest in protecting their sovereign immunity against further encroachment by federal legislation that subjects them to suit in federal court,

and argue that this Court should grant certiorari in order to settle the question whether Congress can freely abrogate Eleventh Amendment immunity under the Indian Commerce Clause.

The States also argue that this Court has only upheld the congressional abrogation of state sovereign immunity where Congress' power to enact legislation under the Constitution would be incomplete without subjecting states to suit in federal court. IGRA presents no such necessity to subject states to suit by Indian tribes in order to accomplish its regulation of Indian gambling, a matter under its complete and plenary authority over Indian affairs in the Constitution. As argued, Congress sidestepped federal regulation of these matters and instead enacted a scheme that directly coerces the States to carry out a federal regulatory scheme as if the States were mere subdivisions of the national government, in violation of the Tenth Amendment and the principles of *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408 (1992). IGRA's compulsion of the States to negotiate tribal-state gambling compacts and its sanction of a lawsuit in federal court to compel the negotiations and compacting is a definitive example of a Tenth Amendment violation enforced by an Eleventh Amendment violation.

ARGUMENT

I.

THE STATES HAVE A VITAL INTEREST IN THIS COURT RESOLVING THE CONFLICT IN THE FEDERAL CIRCUITS ON THE POWER OF CONGRESS TO ABROGATE STATE SOVEREIGN IMMUNITY WHEN USED TO COMPEL THE STATES' PERFORMANCE

The holding by the Tenth Circuit that Congress has the power to abrogate the state's Eleventh Amendment immunity under the Indian Commerce Clause is at odds with the holding of the Eleventh Circuit in *Seminole Tribe*

of Florida v. Florida, 11 F.3d 1016 (1994), that Congress has no such power. That disparity gives three states – Alabama, Georgia and Florida – the benefit of a rule that bars Indian tribes from suing these states under IGRA in federal court without their consent, while the six states with Indian tribes in the Tenth Circuit -- Colorado, Kansas, New Mexico, Utah and Wyoming – live under a different rule established in this case and stand subject to suit under the provisions of IGRA without their consent. The consequences of a state being subject to suit in federal court under IGRA is significant, as it may lead to secretarial adoption of a proposed tribal-state compact not agreed to by the state or federal regulations that may require the state to conduct or regulate activities against its will. Additionally, states in the Eighth and Ninth federal appellate circuits are subject to the same rule now found in the Tenth Circuit. This disparity in the application of the same federal law is of profound consequence to the states concerned. Such a conflict among the circuits is within the scope and character of the reasons for granting certiorari in Supreme Court Rule 10.1(a). Indeed, the conflict can only be resolved by this Court.

This Court has recognized that the Eleventh Amendment generally bars suits against a state by an Indian tribe. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S. Ct. 2578, 2581-83 (1991). The Eleventh Amendment is only emblematic of the states' sovereign immunity, which is itself "part of the understood background against which the Constitution was adopted, . . . " *Pennsylvania v. Union Gas*, 491 U.S. 1, 32 (1989)(Scalia, J., concurring in part and dissenting in part); *see also Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 487 (1987). Before Congress can effectively abrogate a State's immunity, it must have constitutional authority to do so. *Green v. Mansour*, 474 U.S. 64, *reh'g denied* 474 U.S. 1111

(1985) ("States may not be sued in federal court unless . . . Congress, *pursuant to a valid exercise of its power,* unequivocally expresses its intent to abrogate the immunity." Emphasis added.); *Blatchford,* 111 S. Ct. at 2584; *see also Atascadero State Hosp. & California Dep't of Mental Health v. Scanlon,* 473 U.S. 234 (1985); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985).

Here, the Tenth Circuit followed the conclusion of the Ninth Circuit in finding that the power of Congress to abrogate state sovereign immunity under the *Interstate* Commerce Clause, as found in the plurality decision in *Union Gas,* 491 U.S. 1, is equally applicable under the *Indian* Commerce Clause, found in article I, section 8, clause 3 of the U.S. Constitution. *Ponca Tribe,* 37 F.3d at 1430; *see Spokane Tribe of Indians v. State of Washington,* 28 F.3d 991, 996 (9th Cir. 1994). The Ninth Circuit went further and suggested that the *Union Gas* plurality framed its analysis in terms of the Commerce Clause as a whole, and did not limit it to the interstate Commerce Clause. This application of *Union Gas* to the Indian commerce prong differs sharply from that of the Eleventh Circuit in *Seminole,* where the court noted that the *Union Gas* Court in each of its opinions – plurality, concurrences and dissents – addressed only the interstate prong, and that its rationale goes only to the regulation of commerce *among the states.* 11 F.3d at 1027.

A. Plenary Power Alone Does Not Give Congress the Power to Abrogate State Sovereign Immunity.

The Tenth Circuit rests its application of *Union Gas* to the Indian Commerce Clause on the notion that that clause embodies a plenary power of the Congress that limits the power of the states, citing *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976)(finding congressional power to

abrogate under § 5 of the Fourteenth Amendment), and *Union Gas*, 491 U.S. at 19 (plurality opinion)(like the Fourteenth Amendment, the "Commerce Clause withholds power from the States at the same time as it confers it on Congress.") Under this reasoning, any Article I power granted to the Congress by the States in the Constitution, which power in some way withholds power from the States, serves as a basis for congressional power to abrogate state sovereign immunity – rendering the Eleventh Amendment superfluous.[2]

In fact, without conceding the wisdom of Union Gas, the plurality in that case provided an important limitation on the power of Congress to summarily override a state's Eleventh Amendment immunity, found in the continuation of the sentence that refers to the withholding of power from the States while conferring it on Congress. Thus, where

> . . . the congressional power thus conferred *would be incomplete* without the authority to render the States liable in damages, it must be, that to the extent that the States gave Congress the authority to regulate commerce, they also relinquish their immunity where Congress found it necessary, in the exercise of this authority to render it liable.

Union Gas, 491 U.S. at 12-20. In other words, the power to abrogate was found to exist only because Congress'

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[2] As Justice Scalia noted in *Union Gas*:

> [I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable.

Pennsylvania v. Union Gas, 491 U.S. at 42 (Scalia, J., concurring in part and dissenting in part).

power would be incomplete without rendering the states liable in federal court – all in order to accomplish the purpose of its legislation under the Interstate Commerce Clause. *Union Gas* considered Congress' enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), providing means to clean up hazardous waste sites throughout the country. The Act provided who would be liable for the cost of remedial action, and Congress, legislating under the Interstate Commerce Clause, found it was *necessary* to hold the states financially accountable for certain costs of this remedial action. The remedial action would be incomplete without making the states liable *in federal court*.[3]

Similarly, in *Fitzpatrick*, as in *Union Gas*, Congress' power to enforce Title VII of the Civil Rights Act of 1964 was incomplete without the power to make the states, as employers, *liable in federal court* for damages and attorneys fees for unlawful employment discrimination. *Fitzpatrick*, 427 U.S. at 456 ("Congress may . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). Thus, the power to abrogate arises only where Congress's power, when legislating pursuant to Section 5 of the Fourteenth Amendment or the Interstate Commerce Clause, is incomplete without subjecting states to suit for damages in federal court.

In both *Fitzpatrick* and *Union Gas*, this Court has permitted the abrogation of state sovereign immunity only to the extent it permitted suits for damages. To date,

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[3] While the States may be of the view that *Union Gas* is flawed in upholding an Article I congressional power to abrogate state sovereign immunity, it is nonetheless clear that interstate commerce power *standing alone* does not confer power to abrogate the states' Eleventh Amendment immunity.

this Court has not sanctioned congressional abrogation of a state's Eleventh Amendment immunity under any prong of the Commerce Clause permitting the state to be sued in federal court simply to compel it to perform an act mandated by Congress. Yet, that is precisely what IGRA attempts to do:

> If, in any action described in subparagraph (A)(i), the [district] court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, *the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period.* . . . If a State and Indian tribe fail to conclude a Tribal State compact . . . within the 60-day period provided in the order of the court . . . , the Indian tribe and *the State shall submit to a mediator appointed by the court a proposed compact* . . .

25 U.S.C. § 2710(d)(7)(B)(iii)-(iv). While the plenary power of the Congress with respect to Indian affairs may displace the power of the States with respect to Indians, the Indian Commerce Clause does not allow Congress to abrogate state sovereign immunity solely to compel a State to perform an act otherwise within the scope of the federal government to perform. This use of the federal courts to compel the States' performance offends not only the Eleventh Amendment, but also the Tenth Amendment, as discussed in Argument II, below.

Further, the Tenth Circuit lightly dismissed the analysis of the Eleventh Circuit in *Seminole* of the important distinctions in the respective purposes of Interstate Commerce Clause and the Indian Commerce Clause, noting the analysis was not on point as to the power to abrogate. However, the *Seminole* court aptly noted

> In [*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192], the Court acknowledged the plenary powers under the Interstate Commerce

> Clause that allow Congress to place limits on the states [was] in order to "maintain[] free trade among the States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with power to legislate in the field of Indian affairs. *Id.* Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate they be treated distinctly.

11 F.3d at 1027. These sharply different readings of the *Union Gas* opinion and the diametrically opposed conclusions as to abrogation power under the Indian Commerce Clause leave the states with no guidance as to whether suits by tribes against the states, without the consent of the states, are jurisdictionally barred or not.[4]

B. The States Did Not Contemplate in the Plan of the Convention that Article I Powers Include the Ability of Congress to Abrogate State Sovereign Immunity.

Finally, the Tenth Circuit also lightly dismissed this Court's analysis of states' Eleventh Amendment immunity from suits by an Indian tribe in *Blatchford v. Native Village of Noatak*, 111 S. Ct. at 2581-83. It is true that the

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[4] The Eighth Circuit also presents a conflict with the Eleventh Circuit on this same issue. In *Cheyenne River Sioux v. State of South Dakota*, 3 F.3d 273 (1993), the Eighth Circuit relied on the decision of the district court in *Seminole Tribe of Florida*, reversed by the Eleventh Circuit, for the notion that the Indian Commerce Clause provided the congressional power to abrogate the states' sovereign immunity. 3 F.3d at 280-81.

Blatchford court had no occasion to consider whether Congress had the power to abrogate under the Indian Commerce Clause, as it found no statutory expression of clear and unequivocal intent to abrogate; the Court did not need to reach the question of the existence of the congressional power. 111 S. Ct. at 2584. *Blatchford*, however, did conclude there was no *waiver* of state sovereign immunity "inherent in the plan of the convention," noting

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citation omitted], as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 111 S. Ct. at 2582-83, emphasis in original.

While this holding on *waiver* does not answer directly whether Congress has the power to *abrogate* state sovereign immunity under its plenary powers in the Indian Commerce Clause, it is a compelling indirect answer that Congress does not have that power. When the States compacted with a federal government and gave certain powers over to it, reserving others, how could the States have contemplated Congress nullifying that immunity which they did not surrender for the benefit of Indian tribes? Obviously, abrogation comes into play only where there is no waiver, but this Court's reasoning in *Blatchford* demonstrates the States did not contemplate that granting power to Congress for Indian commerce would subject the States to suit in federal court by Indian tribes to

compel the States to perform certain acts for the benefit of Indians tribes.

In sum, amici States have a vital interest in the resolution of the question presented by the Tenth Circuit, as it goes to the fundamental relationship of the States with the Federal Government, presenting important questions of federalism. To date, this Court has found Congress' power to abrogate only in Section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, and in the *Interstate Commerce Clause, Union Gas*, 491 U.S. 1. The significance of finding yet another constitutional provision that gives the Congress power to abrogate state sovereign immunity, one that permits the courts to compel States to perform certain acts, cannot be understated – it would lead to a critical undermining of our federal system of government and further strengthen the power of the federal government at the expense of the states. *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989). The resolution of this question, then, falls within the scope and character of the reasons for granting certiorari under Supreme Court Rule 10.1(c), as an important question of federal law not settled by this court.

II.

THE TENTH AMENDMENT PROHIBITS APPLICATION OF THE COERCIVE PROVISIONS OF THE IGRA

In IGRA, Congress directly commands the States to negotiate and implement a tribal-state scheme that deprives the States of their sovereign role, in violation of the Tenth Amendment. Under the Act, an Indian tribe retains the sovereign prerogative to request state participation in the regulation of gaming activities on Indian lands. 25 U.S.C. § 2710(d)(1)(C). If an Indian tribe requests a State to negotiate for a compact concerning

class III gaming, the State "*shall* negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The federal government, while it has plenary authority for Indian affairs, assumes little or no responsibility for the formulation or implementation of a regulatory scheme for this Indian gaming.

The *coercive* elements of 25 U.S.C. § 2710(d)(3), *requiring* states to negotiate, under pain of federal court compulsion, reduce the States to mere administrative subdivisions of the Federal Government and do injury to their sovereignty. IGRA requires the States to exercise their sovereign discretion and carry out duties which the federal government refuses to do itself. As this Court most recently reaffirmed in *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408 (1992):

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. . . . The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment.

112 S. Ct. at 2434 (citations omitted).

The federal government may not *compel* a State to regulate in an area of federal responsibility. Indeed, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." 112 S. Ct. at 2429 (emphasis added). When it comes to handling certain affairs, the States expressly vested in *Congress* responsibility for regulating commerce "with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Amici do not

believe that article I of the Constitution authorized Congress to avoid its obligation by forcing the several States to in effect enter into treaties with Indian tribes.

Instead, Congress chose to compel a state to negotiate a tribal-state compact under 25 U.S.C. § 2710(d)(3)(A), at the request of a tribe; to subject that state to being hauled into federal court under a claim that it failed to negotiate in good faith under 25 U.S.C. § 2710(d)(7); to subject the state to the compulsion of a federal court order to further negotiate; to subject the state to compulsion to submit a last best offer to a court-appointed mediator; and to require the state to make a selection from the mediator. 25 U.S.C. § 2710(d)(7).

Congress may, of course, pursuant to its plenary authority over Indian affairs, *encourage* the aid of the States in regulating the conduct of gaming activities on Indian lands. *Red Lake Band of Chippewa v. Swimmer*, 740 F. Supp. 9, 13-14 (D.D.C. 1990), *aff'd, Red Lake Band of Chippewa v. Brown*, 928 F.2d 467 (D.C. Cir. 1991). Congress may, of course, encourage a state to regulate in a certain way, short of outright coercion. Under its spending power, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1936). Where Congress has the authority to regulate private activity under the Commerce Clause, Congress may offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981). Neither such incentive is present under IGRA.[5]

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[5] In *Hodel*, the Court considered whether the "steep slope" provisions of the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (1988), commandeered the states' sovereign ability to regulate land use. There, unlike this case, the Act

When Congress conscripts states into fashioning and implementing a regulatory scheme to achieve federal ends, congressional representatives avoid political accountability. In IGRA, the scheme created by Congress minimizes the accountability of federal officials to the public. The legislation mandates that the States "work it out" with the tribes. It is thus the *State* officials who must bear the brunt of public disapproval, while congressional representatives – and, of course, the Secretary of the Interior, who ultimately approves the regulatory scheme, 25 U.S.C. § 2710(d)(8) – remain insulated from the political consequences of the conduct of gaming on Indian lands.

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provided for a federal regulatory scheme that could be implemented in full force by the Federal Government; if States did not wish to participate, the full regulatory burden would then be borne by the Federal Government. *See New York v. United States*, 112 S. Ct. 2408, 2420 (1992). States are free to choose whether to consider the incentives to participate or to not participate; they are always free under the Act to enact and administer their own regulatory programs within limits established by federal minimum standards. Similarly, in *FERC v. Mississippi*, 456 U.S. 742 (1982), the Congress passed the Public Utilities Regulatory Policies Act (PURPA) of 1978, to encourage States in various ways to develop programs to combat the then so-called energy crisis. This Court found no "command" to the States in the statute: the States were offered the choice of regulating activity according to federal standards or have state law preempted by federal regulation. "By [these] methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. . . . Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *New York v. United States*, 112 S. Ct. at 2424.

As with the coercive "take title" provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Public Law 99-240, 99 Stat. 1842, 42 U.S.C. § 2021b et seq., struck down by the Court in *New York v. United States*, 112 S. Ct. at 2408, IGRA's scheme unconstitutionally coerces States into participation in IGRA by holding out two impermissible choices, two coercive applications of federal law: "the State *shall* negotiate with the Indian tribe," 25 U.S.C. § 2710(d)(3)(A), or else face litigation in federal court, 25 U.S.C. § 2710(d)(7)(A) – with the additional coercive processes of forced negotiations, 25 U.S.C. § 2710(d)(7)(B)(iii); mediation, 25 U.S.C. § 2710(d)(7)(B)(iv); and ultimately, of imposition of a federally prescribed regulatory system which may even compel the state to create a system for regulating a game that is illegal within that state, 25 U.S.C. § 2710(d)(7)(B)(vii).

The Tenth Circuit, however, found IGRA does not run afoul of the Tenth Amendment because it "merely directs the state to negotiate in good faith, and stops well short of imposing a requirement on the states to enact or enforce a federal regulatory program, . . . " *Ponca Tribe*, 37 F.3d at 1434. The court likened this to "encouragement," not a mandate, to achieve "cooperative rulemaking" with the tribe. *Ibid.* In so saying, the Circuit Court overlooks the plain language and reality of IGRA. IGRA, by its own terms, imposes a requirement on the states to fashion, implement and enforce a regulatory program which the federal government refuses to do itself. This constitutes a direct interference with the states' sovereign reserved powers to contract, *United States v. Bekins*, 304 U.S. 27 (1938), in violation of the Tenth Amendment. It is a direct commandment to the states to engage in a regulatory

process or face the penalty of being hauled into federal court.[6]

The Tenth Circuit also ignores the "alternative" faced by a state if, for any reason, a state is accused of lack of good faith in negotiations. The history of this and the other cases before this Court illustrates the reality of IGRA. In each of the cases before this Court from the Ninth, Tenth and Eleventh Circuits, Indian tribes demanded the states negotiate for casino gambling activities that were criminally prohibited by the states. When the states, in good faith reliance upon the language of IGRA and their legal interpretation of it, refused to negotiate for illegal gaming activities, tribes brought suit, claiming the states were negotiating in bad faith. Had the states not brought constitutional defenses, they would be subject to court-ordered continuation of negotiations, court-ordered mediation and/or a submission of a mediator's selection of a last best offer compact to the Secretary of Interior. 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). If the matter reaches the Secretary, the Secretary must prescribe procedures consistent with the compact selected by the mediator, including, presumably, regulatory obligations placed upon the state. The state must then countenance

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[6] Additionally, if IGRA only "encourages" "cooperative rulemaking," and compliance with IGRA's good faith negotiation provisions is truly voluntary, then there is no Article III "case or controversy" in IGRA cases. If the Governors and the States do not negotiate in a voluntary arrangement, that is the end of the matter – there is no controversy for the court to adjudicate, no need for orders to negotiate and mediate, and no reason for Article III courts to declare the rights of tribes to negotiate with an unwilling partner. The entire basis of the court's jurisdiction is the existence of a case or controversy over a legal *duty* purportedly established by IGRA. If there is no duty, and the state's participation under IGRA is voluntary, the federal courts have no jurisdiction to hear these cases.

gaming activities, procedures, locations and facilities that may run contrary to the state's public policy or negotiating position.

What the Tenth Circuit calls a "default provision," then, is no "choice" for the States. The State's mere "choosing" to not negotiate must necessarily result in a court finding that the State is *in bad faith* before the mediational procedures ensue to the Tribes' benefit. Then, the State must ignore at its peril a court order to negotiate within a 60-day period. *States submitting themselves to being adjudged to be in bad faith and ignoring federal court orders at their own peril is not an acceptable means for appropriate decision-making on major matters of public policy.* This is coercion at its worst.

In sum, the States did not authorize Congress to *impose* upon them responsibility for determining the conditions under which casino gambling will be conducted on Indian lands within the State. Congress may either regulate such gambling directly, or Congress may permit the tribes to regulate such gambling exclusively; within either option, Congress may *invite* the States to undertake regulation of the activity in lieu of direct federal or tribal regulation. Such a scheme ensures the electoral accountability of federal and state officials, as the case may be, for the decisions made concerning the regulation of casino gambling on Indian lands. But Congress may not shield itself and federal officials from accountability for the conduct of casino gambling on Indian lands by making state officials responsible for fashioning the regulatory scheme – under threat of suit by Indian tribes who have no accountability to the state electorate.

The States are presented with a perplexing and unpalatable set of conditions: if the Tenth Circuit ruling is upheld, states will continue to be subjected to lawsuits by

Indian tribes they may not sue themselves, which lawsuits are solely to compel the states to perform acts that are not within their scope of affairs and which are wholly within the scope of the federal government's plenary powers. Because subjecting the States to suit by Indian tribes in federal court is not essential to the power of the Congress to provide for Indian gaming, Congress has no power to abrogate the state's Eleventh Amendment immunity. Under the Tenth Circuit's reasoning that any plenary power in the Congress gives rise to a power to abrogate Eleventh Amendment immunity, a constitutional wall has been reduced to a statutory hurdle and the Eleventh Amendment is rendered superfluous.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari filed by the State of Oklahoma should be granted.

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